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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. [illegible]

HOUSTON OIL COMPANY OF TEXAS, Petitioner,

v.

AMERICAN REPUBLICS CORPORATION, Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No._____

HOUSTON OIL COMPANY OF TEXAS, *Petitioner*,

v.

AMERICAN REPUBLICS CORPORATION, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Houston Oil Company of Texas, respectfully petitions this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Statement of the Matter Involved

Under date of November 15, 1916, Petitioner and Southwestern Settlement and Development Company, on the one hand, and Respondent's predecessor, Republic Production Company, and Federal Petroleum Company, on the other hand, jointly entered into and executed an instrument designated "Operating Contract and Conveyance", which instrument is in the nature of a conveyance (with covenant of limited special warranty only) by Petitioner and South-

western to Respondent's predecessor and Federal Petroleum of an undivided one-half (½) interest in certain oil, gas and mineral rights in and to numerous tracts of land in several Texas Counties and several Parishes in Louisiana; and also in the nature of a contract between the parties providing for the exploration and development of the oil, gas and mineral estate therein dealt with at joint and equal expense and the equal division of production therefrom (R. Vol. I, pp. 161-186).

With respect to the oil and gas rights (as distinguished from other minerals) in the lands situated in Texas, the Operating Contract and Conveyance is between Petitioner and Respondent's predecessor. Southwestern and Federal Petroleum have no interest in such oil and gas rights and, since this litigation involves only the oil and gas rights in Texas, they are not parties to this suit.

Pursuant to Clause 9 of the Operating Contract and Conveyance (Stipulation No. III, R. Vol. I, pp. 186-187) the parties thereto jointly executed another instrument designated "Conveyance" (R. Vol. I, pp. 45-61) which is identical with the conveyancing portion of the Operating Contract and Conveyance and is subject to the "terms and provisions" thereof. This instrument also bears date of November 15, 1916, but was executed about two months subsequent to the execution of the Operating Contract and Conveyance.

Petitioner and Respondent's predecessor operated under the Operating Contract and Conveyance from its date until during the year 1939 without any question being raised with respect to their joint and equal ownership in the oil and gas rights or estate dealt with in the instrument. Wells were drilled and production obtained during such period, the drilling and operation of the wells being at joint and equal expense and the production being equally divided, all of which

was in accordance with the terms and provisions of the instrument. Although numerous suits were brought by third parties during such period of time involving tracts of land referred to in the Operating Contract and Conveyance and resulting in losses of oil and gas rights in such lands, Respondent's predecessor bore an equal share of such losses without question until the year 1939. At that time the plaintiffs in a suit herein referred to as the THOMAS CASE, who were the record owners of an outstanding three thirty-fifths (3/35ths) undivided interest in 4328 acres of the Arriola League in Hardin County, Texas, one of the tracts referred to in the instrument, recovered such undivided interest in the oil and gas estate in and to such tract of land. Then it was, for the first time, that Respondent's predecessors asserted that it owned a greater interest in the oil and gas estate dealt with in the instrument than Petitioner. Specifically, it contended that Petitioner, by the instrument, had conveyed to it a full one-half (½) undivided interest in the oil and gas estate in such tract of land (and all other tracts referred to in the instrument) and that the loss of the three thirty-fifths (3/35ths) interest must be borne by Petitioner alone, thus creating an unequal ownership between it and Petitioner with respect to the oil and gas estate in said tract of land (R. Vol. I, pp. 411-414 and 421-433).

Petitioner, by agreed judgment and deed, acquired the three thirty-fifths (3/35ths) undivided interest for the sum of Fifty Thousand Dollars ($50,000.00) cash and the payment of certain royalties on future production from the tract of land (R. Vol. I, pp. 32-45 and 496-508). Contemporaneously with the entry of the agreed judgment, Respondent's predecessor and Petitioner entered into an agreement whereby it was stipulated that the entry of the agreed judgment would not prejudice the rights of either party

and that if it should be determined by settlement or litigation between the parties that their interest and title in the oil and gas in the 4328 acre tract of land was equal prior to the entry of the agreed judgment, then Respondent's predecessor would reimburse Petitioner for one-half (½) of the money and royalties paid and to be paid by Petitioner under the terms of such judgment (R. Vol. I, pp. 510-512).

This suit was brought by Petitioner, a Texas Corporation, in the United States District Court for the Eastern District of Texas, Beaumont Division, against Respondent, a Delaware Corporation, (it having succeeded to the rights and titles and having assumed the obligations of Republic Production Company by merger) seeking a declaratory judgment construing and declaring the legal effect of the Operating Contract and Conveyance and the Conveyance and for the recovery of one-half (½) of such sums of money as Petitioner had paid in acquiring the three thirty-fifths (3/35ths) interest in the 4328 acre tract of land (R. Vol. I, pp. 1-24).

The respective contentions of the parties, as made by the pleadings and as urged in the Trial Court and the Court of Appeals, are:

1. Petitioner contends

(a) that the instruments involved conveyed to Respondent's predecessor an undivided one-half (½) interest in such, and only such, oil and gas estate as Petitioner owned in the particular tracts of land therein referred to on the effective date thereof, together with an undivided one-half (½) of any and all other oil and gas rights then owned by Petitioner in the State of Texas (except in Navarro County),

(b) that since the three-thirty fifths (3/35ths) undivided interest recovered by plaintiffs in the THOMAS

CASE was never owned by Petitioner, no part thereof was conveyed to Respondent's predecessor and therefore Respondent is liable for one-half of the sums of money paid by Petitioner in acquiring such interest, and

(c) that in tracts of land designated as drilling units under the terms and provisions of the Operating Contract and Conveyance (as had been done on the 4328 acre tract in the Arriola League) the title to the oil and gas in place, as well as the production, is fixed and established in equal proportions between Petitioner and Respondent.

2. Respondent contends

(a) that the instruments involved conveyed to its predecessor a full undivided one-half (½) interest in the entire oil and gas estate in and to each and every tract of land referred to in the instruments, which includes the 4328 acres in the Arriola League as it is referred to therein,

(b) that Petitioner, by recitals in the instruments, asserted and declared that it owned full, complete and entire title to the oil and gas estate in and to each and all of the tracts of land referred to therein and is now estopped to deny such assertions and declarations and is estopped to deny that it conveyed to Respondent's predecessor a full undivided one-half (½) interest therein,

(c) that none of the three thirty-fifths (3/35ths) interest recovered by plaintiffs in the THOMAS CASE should come out of the one-half (½) interest claimed by Respondent but all of it should come out of the other one-half (½) and that it, therefore, is not liable to Petitioner for any portion of the money paid by Petitioner in the acquisition of such interest, and

(d) that notwithstanding the terms of the Operating Contract and Conveyance providing for development of the oil and gas estate at joint and equal expense (as followed in drilling and development operations on

the 4328 acres in the Arriola League) and equal division of production, Respondent is entitled to one-half (½) of the production from each particular tract of land, thereby reducing Petitioner to a share of less than one-half of such production in instances where there is an outstanding interest in third parties.

The case was tried before the Honorable Ben H. Rice, Jr., and, based upon appropriate and supporting Findings and Conclusions (R. Vol. I, pp. 109-125), a Decree was rendered and entered construing the instruments as contended for by Petitioner and in favor of Petitioner for one-half (½) of the sums of money it had expended in acquiring the outstanding interest in the Arriola League (R. I, pp. 125-131).

The Court of Appeals reversed the judgment of the Trial Court and rendered judgment in favor of Respondent, with one of the Judges dissenting (R. Vol. III, p. 1540). As we construe the majority Opinion (R. Vol. III, pp. 1524-1539, 173 F. (2d) 728), the decision and judgment of the Court of Appeals are based upon the following holdings of the Court (R. Vol. III, p. 1533):

"We put completely aside then all of the evidence about negotiations before the contracts were executed, because those negotiations became integrated in the written contracts and there is no claim here for a reformation. We put aside, too, all of the things that were done after these instruments were executed, because to be effective to change the meaning of the grant to it, these things would have had to be done by Republic under circumstances which showed a waiver of, or a purpose to waive, its known rights, and we examine the instruments in suit in the light of the settled law of Texas. So examining them, we have no hesitancy in saying that Houston by asserting in its deed that it

owned the minerals, and then conveying with a covenant of special warranty a full undivided one-half interest in and to them, absolutely and completely estopped itself by the deed from ever claiming to the contrary of its declaration that it did own the whole and could and would sell a full undivided one-half of them and from ever claiming against its warranty a title in diminution of the one-half it had conveyed."

Inasmuch as the two instruments here involved are both parts of a single transaction and since the Conveyance, in its entirety, is incorporated in the Operating Contract and Conveyance and is subject to the terms and provisions thereof, the instruments, under Texas law, must be construed together. Construction of the Operating Contract and Conveyance will necessarily be a construction of the Conveyance, for which reason the remarks and statements hereinafter made will be with reference to the Operating Contract and Conveyance, but will equally apply to the Conveyance.

Basis of Supreme Court's Jurisdiction

This Honorable Court has jurisdiction to review this case by Writ of Certiorari under Subdivision (1), Section 1254, JUDICIARY AND JUDICIAL PROCEDURE, Act of June 25, 1948, Title 28, U. S. C.

This is a case in which Federal jurisdiction is based on diversity of citizenship and in which the rights of the parties are to be determined in accordance with the rule of decision prevailing in the State Courts of Texas. The Court of Appeals has failed to follow the applicable rules of law as established by the Texas Courts in arriving at its decision and judgment in this case, and has decided an important question of local law in a way probably in conflict with appli-

cable local decisions (Rule 38, Sub. 5(b), RULES OF THE SUPREME COURT).

The Petition for Rehearing herein was denied on May 23, 1949 (R. Vol. III, p. 1558), and this Petition for Writ of Certiorari was filed within ninety (90) days from such date in accordance with Subdivision (c), Section 2101, JUDICIARY AND JUDICIAL PROCEDURE, Title 28, U. S. C.

Questions Presented

The ultimate legal questions presented by this Petition, the answers to which, in our opinion, are determinative of whether Writ of Certiorari should be granted, are:

1. Did the Court of Appeals fail to follow the applicable rules of construction as established by decisions of the Texas Courts in construing the Operating Contract and Conveyance as conveying, or purporting to convey, a full one-half (½) undivided interest in the oil and gas underlying each and all of the tracts of land referred to in the instrument?

2. Is the Opinion of the Court of Appeals in conflict with decisions of the Texas Courts in holding extraneous evidence of circumstances surrounding the execution of the instrument, and extraneous evidence showing a practical construction thereof by the parties, inadmissible and not to be considered in aid of the construction thereof?

3. Did the Court of Appeals misconstrue the decisions of the Texas Courts relating to estoppel, resulting in a misapplication of such decisions, and thereby err in applying the doctrine of estoppel against Petitioner?

4. Did the Court of Appeals commit error in failing to hold that Respondent is estopped to deny and repudiate the contract and agreement of its predecessor to equally share

with Petitioner the production from operating units created and designated under the terms of the Operating Contract and Conveyance?

5. Do the opinion and judgment of the Court of Appeals declare the rights and other legal relations of Petitioner and Respondent with respect to their operations under the Operating Contract and Conveyance so as to constitute a declaratory judgment under Section 2201, JUDICIARY AND JUDICIAL PROCEDURE, Act of June 25, 1948, Title 28, U. S. C.?

Reasons for Allowance of Writ

Construction of an instrument dealing with oil and gas rights underlying lands in Texas is sought in this cause. The applicable rules of construction as established and followed by the Texas Courts must be followed by the Federal Courts in construing the instrument. This is the effect of the holdings of this Honorable Court in ERIE RAILROAD COMPANY v. TOMPKINS, 304 U.S. 64; RUHLIN v. N. Y. LIFE INSURANCE CO., 304 U.S. 202; CITIES SERVICE OIL CO. v. DUNLAP, ET AL., 308 U.S. 208.

The Court of Appeals, in this case, failed to apply the rules of construction as established and followed by the Texas Courts and its opinion is, therefore, in conflict with the opinions of Texas Courts. In this case, the Court of Appeals has decided an important question of local law in a way that is in conflict with applicable local decisions.

In this case Petitioner seeks a declaratory judgment under the Declaratory Judgment Act. The judgment and opinion of the Court of Appeals do not constitute a judgment declaring the rights and obligations of Petitioner and Respondent under the instruments to be construed.

(Supporting authorities will be cited and discussed in the annexed Brief.)

Conclusion

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be issued as provided by law to the United States Court of Appeals for the Fifth Circuit, that this case be reviewed and determined by this Honorable Court, that Petitioner have such relief in the premises as to this Honorable Court may seem just, and that the judgment of said Court of Appeals be reversed and the judgment of the Trial Court be affirmed.

Dated, August 17th, 1949.

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HOUSTON OIL COMPANY OF TEXAS, *Petitioner*,

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AMERICAN REPUBLICS CORPORATION, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Courts Below

The Judgment and Findings of Fact and Conclusions of Law of the Trial Court are shown in the Transcript of the Record (R. Vol. I, pp. 125-131 and R. Vol. I, pp. 108-125, respectively). No opinion was written by the Trial Court.

The Opinion of the Court of Appeals is shown in the Transcript of the Record (R. Vol. III, pp. 1524-1539) and is reported in 173 F. (2d) 728. JUDGE WALLER dissented but filed no separate dissenting opinion (R. Vol. III, p. 1539).

Jurisdictional Statement

This is a case in which Federal jurisdiction is based on diversity of citizenship. It involves the construction of in-

struments dealing with oil and gas rights in and under lands in Texas and is therefore governed by Texas law. It is Petitioner's contention that the Court of Appeals failed to follow applicable Texas decisions and decided an important question of local law in a way that is in conflict with applicable local decisions.

This Honorable Court has jurisdiction to review this case by Certiorari under Section 1254, Sub. (1), JUDICIARY AND JUDICIAL PROCEDURE, Act of June 25, 1948, Title 28, U.S.C.

Statement of the Case

The "STATEMENT OF THE MATTER INVOLVED" in the Petition is adopted as a Statement of the Case in this Brief. Such additional explanatory statements as deemed desirable to a clear understanding of the Points of Error presented will be made in the Arguments under such Points.

Preliminary Statement

Two instruments are involved but, as stated in the Petition, construction of the Operating Contract and Conveyance governs the construction of the separate Conveyance. This is true not only because the latter is embodied in the former and is subject to all the terms and provisions thereof, but also because the two are but constituent parts of a single transaction. The applicable Texas rule is stated in BARBER v. HERRING (Tex. Com. App.), 229 S.W. 472, 473:

> "Where several instruments are made part of one transaction, they will be read together, and each will be construed with reference to the other."

That this is the rule followed in the Federal Courts is evident from the following language in EMPIRE GAS & FUEL

Co. v. STERN (8 C.C.A.), 15 F. (2d) 323, cert. den. 274 U.S. 737:

> "The contract, draft, and lease were all part of one transaction. In the eye of the law, they are one instrument. They will be read and construed together, as if they were one in form as they are in substance."

We proceed, therefore, upon the theory that it is not necessary to take note of the separate Conveyance, except as it is a part of the principal instrument, and will endeavor to demonstrate that the Court of Appeals erred in its construction of the Operating Contract and Conveyance, thereby deciding an important question of local law in a way that is in conflict with applicable local decisions.

Specifications of Error

(The errors herein complained of are raised in the Petition for Rehearing, R. Vol. III, pp. 1541-1557)

1. The Court erred in holding that Petitioner, by the language of the Operating Contract and Conveyance, conveyed to Respondent's predecessor a full one-half (½) undivided interest in the oil and gas underlying each and all of the tracts of land referred to in the instrument, and erred in failing to hold that the instrument conveyed an undivided one-half (½) interest in only such oil and gas estate as Petitioner then owned.

2. The Court erred in holding that the reservation and exception in favor of Petitioner of an undivided one-half (½) of the oil and gas estate dealt with is not of equal dignity with the grant, and erred in failing to give effect thereto.

3. The Court erred in failing to follow the rules of con-

struction as established by Texas Courts in that it failed to discover and ascertain the intention of the parties to the Operating Contract and Conveyance from a consideration of the entire instrument and failed to construe the instrument so as to give effect to such intention.

4. The Court erred in failing to construe the Operating Contract and Conveyance as a contract between the parties rather than as a simple deed or conveyance.

5. The Court erred in holding extraneous evidence of circumstances surrounding the execution of the Operating Contract and Conveyance inadmissible and not to be considered in construing such instrument, and erred in failing to hold that such evidence requires a finding and holding that the parties to the instrument were dealing with only such oil and gas estate as Petitioner owned on the effective date thereof.

6. The Court erred in setting aside fact findings of the Trial Court which are supported by uncontradicted evidence and in substituting therefor its own fact findings.

7. The Court erred in holding that Petitioner asserted and declared that it owed the whole and entire oil and gas estate in and to each and all of the tracts of land referred to in the instrument, and erred in applying the doctrine of estoppel against Petitioner.

8. The Court erred in failing to hold that Respondent is estopped to deny that Petitioner and Respondent own equal shares in the oil and gas estate dealt with in the instrument.

9. The Court erred in failing to fully declare the respective rights and obligations of Petitioner and Respondent under the terms and provisions of the Operating Contract and Conveyance and the judgment and opinion of the Court do not constitute a declaratory judgment as prayed for by Petitioner.

Argument

Each error above complained of will not be argued separately but related errors will be grouped and argued under the following Points of Error. It is not intended, however, to waive or withdraw from the consideration of this Honorable Court any of the errors complained of. All italicizing for emphasis is supplied unless otherwise stated.

First Point: **When construed by the rules of construction prevailing in Texas Courts, the Operating Contract and Conveyance conveys to Respondent's predecessor an undivided one-half (½) interest in such oil and gas rights and estate as Petitioner owned on the effective date thereof in the lands referred to therein, and the Court of Appeals erred in failing to so construe it.**

Second Point: **Giving effect to the manifest intention of the parties as gathered from the instrument as a whole, as must be done under rules of construction prevailing in Texas, requires a holding that the parties thereby intended to, and did, create an equal ownership between Petitioner and Respondent's predecessor in the oil and gas estate therein dealt with, whether it be the full estate in the lands referred to or an estate less than the whole, and the Court of Appeals erred in failing to so hold.**

Argument Under First and Second Points

The instrument involved is not merely a deed or conveyance. It is what its name implies: *An Operating Contract and Conveyance*, having for its sole and only purpose the development of an oil and gas estate "in the manner and

upon the terms" set out in the instrument. It contains three principal parts or features. These are (A) a conveyance of an undivided one-half interest in the mineral estate dealt with, (B) a reservation and exception of the other one-half of the mineral estate dealt with, and (C) a contract and agreement between the parties to develop the mineral estate dealt with at joint and equal expense, risk and liability and to divide the production therefrom equally, each party getting one-half thereof.

The instrument is copied in full (excepting certain unimportant parts) in an Appendix hereto for convenient reference. We believe it will be necessary, however, to set out excerpts therefrom in the body of this Brief and such will be done as briefly and concisely as possible.

In order to point out wherein the Court of Appeals has failed to follow the rules of construction as established by Texas Courts, resulting in a decision by said Court that is in conflict with applicable local law, it will be necessary to discuss the various rules of construction prevailing in Texas. This will lengthen the Brief to some extent but we beg the indulgence of this Honorable Court to the end that the failure of the Court of Appeals to follow local law might be demonstrated.

The cardinal rule of construction of deeds, as established and followed by Texas Courts, is stated in 14 TEX. JUR. 910, Sec. 132, as follows:

> "As in the case of other contracts in writing, the cardinal rule for the construction of deeds is that *the intention of the parties be ascertained and*, if not forbidden by law, *effectuated.*"

The text is supported by PIERSON v. SANGER (Tex. Sup.), 93 Tex. 160, 53 S.W. 1012; CRAVENS v. WHITE (Tex. Sup.),

73 Tex. 577, 11 S.W. 543, and many other cases by the various Appellate Courts of Texas.

Of equal importance is the rule that such intention is to be ascertained from the entire instrument. This rule is thus stated in GIBBS v. BARKLEY (Tex. Com. App.—Op. Approved), 242 S.W. 462, 464:

> "The ultimate purpose in construing a deed is to ascertain the intention of the grantor. When this intention is ascertained, that construction which carries the intention into effect, when such intention is lawful, governs and controls. *The intention,* however, *is* not *to be* gotten from an isolated clause or paragraph, but *gathered from a fair construction of the entire instrument.* Each clause or paragraph must be construed with reference to every other paragraph, and the effect of one paragraph upon the other determined. Hopkins v. Hopkins, 103 Tex. 15, 122 S.W. 15."

The Court of Appeals failed and refused to follow the above rules. It did not gather the intention of the parties from "a fair construction of the instrument," and under its decision the "intention of the parties" as gathered from the instrument as a whole is not "effectuated". It is necessary to analyze the three principal features of the instrument to demonstrate the misconstruction of the Court.

(A) GRANTING CLAUSE

The granting clause, or conveyancing part, should be noticed first because it is apparent, from a reading of the opinion, that the Court based its construction of the instrument upon this part without consideration of the other parts. With certain omissions as indicated and with numbers inserted for convenience, it reads (R. Vol. I, pp. 165-167; Appendix iv-v):

" * * * have granted, bargained, sold and conveyed and do hereby grant, bargain, sell and convey a FULL UNDIVIDED ONE-HALF INTEREST IN AND TO

(1) "ALL OF THE OIL AND GAS AND MINERAL RIGHTS, WHETHER METALLIC OR NON-METALLIC, IN AND UNDER ANY AND ALL LANDS NOW OWNED BY THEM OR EITHER OF THEM (expressly and only excepting lands in Navarro County, Texas), in the State of Texas and in the State of Louisiana, particularly including (without excluding others not specifically described) all those certain tracts of land which are more particularly described in a Decree entered by the Circuit Court of the United States for the Southern District of Texas, at Houston, in Cause No. 54, Equity, entitled 'Maryland Trust Company, Trustee, Complainant, v. Kirby Lumber Company and Houston Oil Company of Texas, Defendants,' dated the 28th of July, 1908, to which reference is hereby made, * * *

(2) "and also any and all oil, gas and mineral rights, whether metallic or non-metallic, now owned by the said grantor or Trust Estate in any lands in the State of Texas the fee in which they never owned, save and except in the County of Navarro, State of Texas;

(3) "and also any and all oil, gas and mineral rights whether metallic or non-metallic, now owned by said Grantor or Trust Estate in the lands in the State of Texas the fee in which the Grantor or Trust Estate once owned but in the sale of which the mineral rights were reserved, save and except the lands in the County of Navarro, State of Texas.

"UNTO THE GRANTEE, REPUBLIC PRODUCTION COMPANY, SAID UNDIVIDED ONE-HALF OF SUCH MINERALS IN ALL SUCH LANDS AS ARE SITUATED IN THE STATE OF TEXAS (except in Navarro County, as aforesaid), and

"UNTO THE GRANTEE, FEDERAL PETROLEUM COMPANY, SAID UNDIVIDED ONE-HALF OF SUCH MINERALS

IN ALL SUCH LANDS AS ARE SITUATED IN THE STATE OF LOUISIANA."

The Court held that by such granting clause Petitioner conveyed to Respondent's predecessor "a full undivided one-half interest in the minerals in and under the lands described by reference". By the expression "lands described by reference", the Court evidently means the lands listed and described in the Decree of 1908, referred to above, because the instrument neither refers to nor describes by reference any other lands.

This portion of the instrument, even if considered alone, will not admit of the construction placed on it by the Court of Appeals. The grant of oil, gas and mineral rights "in and under the lands described by reference" is limited to "any and all lands *now owned*". It is submitted that this expression was used by the parties for some purpose. That purpose could be nothing other than to limit the grant to minerals in, on and under lands *now owned* (then owned). It is expressive of the intention of the parties to deal with only such oil and gas rights as then owned by Petitioner. The Court of Appeals failed to give consideration to this expression of intention.

The language "particularly including * * * all those certain tracts of land * * * more particularly described * * * *" was not intended to, and does not, enlarge the expression "now owned". It simply means that the lands "now owned" are within "those certain tracts", etc. The phrase is neither intended as a representation of complete ownership of the tracts referred to nor that Petitioner was conveying an undivided one-half interest in all of the oil and gas underlying each of said tracts of land. Again, the intention of the grantor, as gathered from the entire instrument, controls. In BARFIELD v. BELCHER LAND MTG. CO. (Tex. Com. App.),

257 S.W. 1095, a deed conveying "all my right, title and interest in and to that tract or parcel of land," describing a tract of 1150 acres and, immediately following the description, reading:

> "The land herein conveyed being the upper half of said tract of land lying in Jones County, Texas, on the west bank of the Elm fork of the Clear fork of the Brazos river,"

was construed by the Court to be a conveyance of grantor's title only and not of the upper half of the described tract. The Court said (1096-97):

> "* * * In determining whether it was the intention of the grantor to convey the property described, or merely his title to the property, the instrument is to be considered in its entirety. If, considered as a whole, it is apparent that the purpose was to convey the property itself, it should be so construed, even though portions of it may indicate that only the grantor's title is conveyed. The statement quoted above is found in that portion of the instrument in which the property is being described, and that, or some similar statement, seems necessary to a proper description thereof. We have concluded that, in the connection in which it was used, this expression evidences only an intention to more fully describe the property, and not the intention to convey the property. Taking into consideration the entire instrument we do not think the court would be warranted in holding that the grantor's intention was to convey the land as distinguished from his title thereto."

There is no difference between a conveyance of land "now owned" by a grantor and a conveyance of all grantor's "right, title and interest" in land. The decision in the above case is applicable here.

The grant of "a full undivided one-half interest in and to all of the oil and gas and mineral rights * * * in and under any land now owned by them * * * in the State of Texas * * * " is complete within itself. The addition of the phrase "particularly including all those certain tracts of land," etc., does not enlarge the grant of mineral rights in and under lands "now owned". COFFEE v. MANLY (Tex. Civ. App., er. ref.), 166 S.W. (2d) 377, 380, quoting from C. J. S., Deeds, says:

> " * * * As to the general rule, said authority says: 'A reference to another deed for the purpose of a more particular description has been regarded as a general description, within the meaning of the rules under consideration. So, where a description in a deed is clear and complete, a reference to other deeds will not necessarily operate to restrict it.' Id., Sec. 100, page 366. Just as certainly, we think, under the same circumstances such references were not necessarily operative to *enlarge it.*" (Emphasis by Court.)

The rule that a particular description controls a general description must yield to the intention of the parties as shown by the whole description. In HOLLOWAY'S UNKNOWN HEIRS v. WHATLEY (Tex. Com. App.–Op. Adopted), 131 S.W. (2d) 89, 92, it is said:

> " * * * where there is a particular description followed by a general description the latter shall yield, though where it is possible *the real intent must be gathered from the whole description, including the general, as well as the special* * * * ."

The Court did not even consider and construe the different parts of the granting clause in relation to each other in order to determine the meaning the parties attached to the language used. It will be noted that the granting clause

deals with and conveys three types or categories of mineral rights:

(1) Mineral rights in and under any and all lands "now owned",

(2) Mineral rights *"now owned"* in any lands the fee in which was never owned, and

(3) Mineral rights *"now owned"* in lands in which the fee was *once owned* but in the sale of which the mineral rights were reserved.

With respect to categories (2) and (3) it is submitted that no logical or reasonable contention could be made that the granting clause purported to convey more than an undivided one-half interest in such mineral rights as were actually owned at the time by grantors and we think the Court of Appeals did not intend to hold to the contrary. The mineral rights in category (1), an undivided one-half interest in which was conveyed, are mineral rights in lands *"now owned"*, which means nothing other than mineral rights *now owned*. It is illogical and unreasonable to contend or conclude that the parties to the instrument attached a different meaning to the expression *"now owned"* when they used it in category (1) to the meaning they attached to the same expression when they used it in categories (2) and (3). It must be given the same meaning in each instance. The failure of the Court of Appeals to construe the first portion of the granting clause with reference to the other parts of the same clause and to determine the effect of the latter portions upon the first portions, and thus arrive at a construction of the whole that would be in keeping with and effectuate the intention of the parties, demonstrates beyond any doubt that such Court departed from the rules of construction established and followed by Texas Courts, GIBBS v. BARKLEY, supra.

(B) Reservation and Exception

The Operating Contract and Conveyance contains a reservation and exception of an undivided one-half interest in the mineral estate dealt with, whether it be the entire estate in all the lands referred to or the estate then owned, but the Court of Appeals gave no consideration thereto in arriving at the intention of the parties. It is contained in the purpose clause, preceding the granting clause, and reads (R. Vol. I, p. 164; Appendix iii-iv):

> "* * * propose now to *convey* to the Grantees herein, * * * , a *full undivided one-half interest* in and to all of the oil, gas and mineral rights, * * * *in the manner and under the terms as hereinafter set forth,* thereby *making* or seeking to make *more valuable the other one-half of all such not thus sold, but reserved.*"

The Trial Court found that the instrument reserved to Petitioner an undivided one-half interest in the oil and gas estate dealt with equal and similar in every respect to the undivided one-half interest conveyed (R. Vol. I, pp. 111-112, Finding VIII) and concluded that such reservation must be construed as of equal force and dignity and similar in every respect to the grant (R. Vol. I, p. 122, Conclusion IX).

The Court of Appeals held that the Trial Court erred in such finding and conclusion and struck down and nullified the reservation and exception. In so doing the Court again failed and refused to follow the established rule of decision in Texas.

Respondent's predecessor not only accepted the instrument containing the reservation and exception but also signed and executed it. Under Texas law it is bound by such reservation and exception. This is the holding in Greene v.

WHITE (Tex. Sup.), 137 Tex. 631, 153 S.W. (2d) 575, and WACO BRIDGE CO. v. CITY OF WACO (Tex. Sup.), 85 Tex. 320, 20 S.W. 137. In GREEN v. WHITE, it is said (583):

> "The general rule is that the grantee in a deed accepted by him is a party to the deed, even though he does not sign it, and that he is concluded by recitals in the deed and by reservation contained therein in favor of the grantor. Martin v. Roberts, 57 Tex. 564, 568; Orbeck v. Alfei, Tex. Civ. App., 276 S.W. 947; 21 Corpus Juris, p. 1095, Sec. 81; 19 Am. Jur., p. 627, Sec. 29, p. 624, Sec. 26. 'The obligations undertaken by the parties to a deed are binding contractually; and where the conveyance is by way of deed poll—that is, one executed by the grantor alone— obligations are enforceable against the grantee by virtue of his acceptance of the deed.' 16 Am. Jur., p. 645, Sec. 358, * * * The recitals which give the surface estate to Garrett and reserve the mineral estate to Greene are likewise contractual. They define the character and extent of the ownership and interests of the parties in the land affected by the deed."

At one time the rule prevailed in Texas that a reservation not expressly set forth in the granting clause was repugnant to the grant and, therefore, void. This ancient technicality has given way to the present rule that if it appears from the instrument as a whole that a reservation was intended it will be upheld regardless of its position in the instrument or the language in which it is expressed.

In BUCKNER v. KING (Tex. Civ. App.), 109 S.W. (2d) 361, the reservation preceded the granting clause and was in the following language:

> "It is not intended to convey any of the Mineral Rights in or under the following described property, as same is retained by Grantors."

The Court held that such reservation was not repugnant to the grant and said:

> " * * * According to the trend of modern decisions, the technical rules of the common law as to the division of deeds into formal parts will not prevail as against the manifest intention of the parties as shown by the whole deed."

The case of REYNOLDS v. MCMAN OIL & GAS CO. (Tex. Com. App.), 11 S.W. (2d) 778, 781, contains the following statement:

> "The inquiry in the present case calls for a consideration of the rules of construction with reference to exceptions and reservations. *The extent, and possible nature, of an estate granted may be dependent upon an exception or reservation in the deed, and the construction and operation of both the grant and the exception or reservation must be determined from the entire instrument, taking into consideration the object and purposes of the instrument.* * * * For the purpose of determining the extent of the grant, however, the distinction between exceptions and reservations is of no practical importance, *since whether the one or the other the property excepted or the estate reserved is never included in the grant.*"

Similar holdings are made in:

Associated Oil Co. v. Hart (Tex. Com. App.), 277 S.W. 1043;
Jones v. Sun Oil Co. (Tex. Civ. App.—err. ref.), 110 S.W. (2d) 80;
Countiss v. Baldwin (Tex. Civ. App.), 151 S.W. (2d) 235.

Whatever be the extent or quantum of the oil and gas

estate dealt with in the Operating Contract and Conveyance, whether the whole and entire estate in all of the lands referred to or whether an estate less than the whole, when the Texas decisions are applied to the instrument it must be held that Petitioner reserved an undivided one-half interest in the same oil and gas estate of which an undivided one-half interest was conveyed to Respondent's predecessor.

(C) Provisions Relating to Development and Division of Production

The purpose clause of the Operating Contract and Conveyance, hereinabove quoted, recites that the purpose of Petitioner in making the conveyance and entering into the contract with respect to the mineral estate dealt with was "to promote and advance the development of same" and that the conveyance of an undivided one-half interest to Respondent's predecessor was "in the manner and under the terms hereinafter set forth" for the specific purpose of "making or seeking to make, more valuable the other one-half." A part of the consideration passing to Petitioner is recited to be "the further terms hereof."

What are the "further terms" thus recited to be the moving inducement causing Petitioner to execute this instrument? They are the numbered sections of the instrument providing for a plan of development of the mineral estate at joint and equal expense, risk and liability and for an equal division of the production and the establishment of an equal ownership of the oil and gas estate between Petitioner and Respondent's predecessor. The pertinent Sections are (R. Vol. I, pp. 170-175; Appendix pp. viii-xii):

> Section 2. "All such lands for the purposes hereof shall be divided into units of approximately 640 acres. Each and all of such units shall have separate considera-

tion and application hereunder * * * After unit lines have been defined such shall not be changed without consent of parties at interest."

Section 3. "*Prior to and until the completion of the deferred payments* * * * all operations on the premises for the development of such minerals shall be conducted by the Grantees (Respondent) and *the interest of the Grantees shall be that of an undivided one-half,* and *the interest of Grantor* (Petitioner) *and Trust Estate shall* collectively *be that of an undivided one-half* * * * in and to the particular unit or units being developed; * * * and *all expense* and *risk* and *liability arising out of such operations* to obtain a production *shall be borne, one-half by Grantees and the other half by Grantor* and Trust Estate."

Section 4. "*Accurate accounts shall be kept* and rendered monthly by Grantees respectively, *of all production of minerals* of all kinds *upon premises or units which may have been developed and rendered producing* by the expenditure of such deferred payments. *Grantees,* * * * *shall own and appropriate one-half thereof and the other half shall be owned and appropriated by the Grantor as to oil and gas* and by the Trust Estate as to all other minerals, such oil and gas to be delivered on the surface to Grantor by Grantee or into such pipe lines available, if any, upon the unit from which such production arises free of cost to Grantor * * * *."

Sction 6. "*After completion of deferred payments* (unless development shall be continued with the fund created under Section 8 hereof, and, in that event, after such fund is expended) *title and ownership of all minerals upon all of the properties covered hereby shall be deemed fixed and final in the terms and proportions as herein provided,* and parties of the first part (Petitioner) or the Grantees, respectively, may proceed with operations of any one or more of the units (except as hereinafter provided) * * * . If within thirty days after such notice is given such other party

shall elect to join in such operations and shall so declare in writing to the party giving such notice, then all such *operations* thereafter *on said unit shall be upon joint account and be conducted as to expense, risk, and liability, accounting and production in the same manner* as provided in Sections three (3) and four (4) hereof. If, however, the party to whom such notice is given shall not within such time elect to join and the party giving such notice shall proceed to develop, then the right of the party to whom such notice is given to so join, and the existing interest of the party to whom such notice is given in the minerals upon such unit or units, shall terminate, and all such interest shall vest exclusively in the party conducting such development operations subject only to *royalty to the other party of 1/16th of all mineral products produced and saved.*"

These provisions not only point to the manifest intention of the parties that there should be an equality of ownership of such oil and gas estate, whether it be the full and entire estate or less than the whole in any unit designated, but they also constitute contractual provisions that fix title to the oil and gas underlying the units thus created and designated. That the provisions relating to a share of the production reserved by a lessor in an oil and gas lease (usually called royalty) is a reservation of and fixes title to the oil and gas in place, as well as after it is produced, is the holding of the Supreme Court of Texas in HAGER v. STAKES, 116 Tex. 453, 294 S.W. 835, 841, wherein it is said:

"We have concluded that, giving effect to all the language of this instrument, it does not grant or convey all the grantor's undivided seventeen-eighteenths of the petroleum in this 150 acres of land, despite the positive terms of the granting and habendum clauses. *For we think a dominant purpose of the parties was to make impossible any other disposition of one-eighth of seventeen-*

eighteenths of this petroleum than its delivery to the lessor or his assigns, as the property of the lessor or his assigns. Hence no matter how poorly expressed, there being no words disclosing such purpose, *there is excepted* from the grant *the one-eighth part of the seventeen-eighteenths of the petroleum.* It is obvious that the instrument negatives the view that the obligation to deliver a portion of the oil was intended to be a mere personal covenant of the lessee or its assigns. Likewise, the obligation was not meant to inure to the personal benefit of the lessor. It was meant to benefit the owner of an estate in the land and to permanently run with the land."

The Court further said:

"* * * There is no escape from the conclusion that the portion of the oil and other minerals not conveyed, but required to be delivered to the lessor, continued to belong to the lessor and continued to be realty."

In principle, we can discern no difference between the instrument there construed and the instrument in the instant case. Each instrument conveys a mineral interest and reserves a mineral interest. In fact, the Operating Contract and Conveyance is in the nature of an oil and gas lease and the rules applicable to construction of leases should be followed in construing it. A lessee, and its assigns, cannot benefit from the mineral estate covered by the lease except by production and by compliance with the terms of the lease; neither could Respondent's predecessor, nor can its assigns, benefit from the conveyance of the mineral interest dealt with in the Operating Contract and Conveyance except by production from the mineral estate and compliance with the terms of the instrument. The Supreme Court of Texas has held that the provisions for distribution of production

contained in leases is to be given more consideration than the granting clause. In STEPHENS COUNTY v. MID-KANSAS OIL & GAS CO., 113 Tex. 160, 254 S.W. 290, it is said:

> "'* * * * The instruments simply provide for the development of the land and distribution of the minerals which are discovered. For this reason, *the parties usually attach little or no significance to the language in the granting clause.* The thing that the landowner is interested in giving, and the thing that the operator is interested in obtaining, is the right to enter on the land, to the exclusion of all others, for the purpose of discovering and producing minerals that exist, and to distribute such minerals in accordance with the lease, usually one-eighth to the landowner and seven-eighths to the operator.'"

In SHEFFIELD v. HOGG (Tex. Sup.), 124 Tex. 290, 77 S.W. 1021, 1024, it is held that the royalty reserved in a lease is an interest in realty, title to which remains or vests in the lessor.

Construing the instrument involved as a contract, which it is, requires a construction that will effectuate the dominant purpose of the contract. In PERRY & CO. v. LANGBEHN (Tex. Sup.), 252 S.W. 472, 474, it is said:

> "Contracts of the character before us are to be construed as any other class of contracts. The intent of the parties is to be sought, and when found is to be made effectual, if possible. A liberal construction is to be given in furtherance of the real intention of the parties, and all provisions must be taken into consideration in determining the scope and effect of the contract as a whole. *If inharmonious provisions are found, its general intent and leading purpose should control minor provisions.* 36 Cyc., pp. 62, 64, 206, 213; Hearne v. Gillett, 62 Tex. 23, 26; Knapp v. Patterson, 99 Tex. 400, 90 S.W. 163; Moore v. Waco, 85 Tex. 206, 211, 20 S.W. 61."

In the case of WEAVER, ET AL., v. WEAVER (Tex. Civ. App.), 171 S.W. (2d) 898, 900, the rule is thus expressed:

> " * * * In case of a variance between clauses, the one which contributes most essentially to the contract is entitled to the most consideration. 10 Tex. Jur. 311. * * * "

The leading and dominant purpose is plainly disclosed on the face of the instrument here involved to be development of the oil and gas estate. The parties by their solemn contract have agreed upon the plan for such development and the basis for payment of the costs thereof and the division of the production therefrom. If any language in the granting clause is in conflict with these provisions (which we do not concede) then, under the above authorities, these provisions, setting out the dominant purpose of the instrument, must prevail and it must be so construed as to give effect to them.

That the granting clause of the instrument must be construed in connection with the development provisions and the reservation and exception is the holding in HOPKINS v. HOPKINS (Tex. Sup.), 103 Tex. 15, 122 S.W. 15. Construction of a deed was involved, the specific question being whether it conveyed a fee simple or a life estate. The granting clause conveyed a fee simple estate but recited that the grant was "upon the terms and conditions hereinafter stated". Following the habendum and warranty, the deed contained a provision limiting the estate granted to a life estate. In giving effect to such provision and holding that a life estate only was conveyed, the Court said (16):

> "The grant in the first clause to Samuel Bunch Hopkins and to his heirs, if that were all, unquestionably would create in him a fee simple; but we cannot stop at

those words, because the clause itself does not stop with them. The *added words*, 'upon the terms and conditions hereinafter stated,' *are a part of the granting clause itself and of equal dignity with the other language of that clause.* Until we look to the other parts of the deed to see the 'terms and conditions,' we cannot rest upon the assumption that the estate granted is such as the other words, by themselves, would convey, for, as we shall see, it was competent for the grantors, notwithstanding the use of the words proper to the creation of a fee simple, to show by other provisions in the deed that those words were used in a restrictive, but legitimate sense, in which they would create a life estate only. *The reference in the first clause to other parts of the deed* for provisions that might determine the quantity of the estate granted *had the effect of importing into the granting clause those other parts and of making them a part of that clause as fully as if they had been written therein.*"

The Court of Appeals held that the agreement by Respondent's predecessor to development of the mineral estate at joint and equal expense, risk and liability and to equally divide the production therefrom was based upon its belief, induced by assertions and declarations of sole ownership on the part of Petitioner, that Petitioner owned the full and complete oil and gas estate in the lands "described by reference" in the instrument. The error of such holding is shown, not only by the uncontradicted evidence that Respondent's predecessor absolutely knew that Petitioner *did not own* the full oil and gas estate under all such lands, but also by the instrument itself. Section 2, above quoted, in providing for the creation of units, does not differentiate between the lands and minerals dealt with in category (1) in the granting clause and those dealt with in categories (2) and (3). All three categories receive the same treatment in the

sections providing for creation of units, development at joint and equal expense, and equal division of production. As pointed out above, there could be no basis for belief on the part of Respondent's predecessor that Petitioner owned the entire oil and gas estate under lands dealt with in categories (2) and (3). The instrument absolutely refutes the above holding of the Court of Appeals.

When the rules of construction prevailing in Texas are applied, it must be held that the instrument here involved provides for equal ownership between Petitioner and Respondent of the oil and gas estate dealt with therein. This necessitates a holding that Petitioner conveyed to Respondent's predecessor an undivided one-half interest in such oil and gas estate as was owned by Petitioner on the effective date of the instrument. In holding to the contrary, the Court of Appeals has failed to follow the rule of decision in Texas and has decided an important question of local law in a way that is in conflict with applicable local decisions.

Third Point: **The instrument in question being in the nature of a contract, as distinguished from a mere deed or conveyance, evidence of circumstances surrounding the execution thereof is admissible, under the decisions of Texas Courts, in aid of its construction. The undisputed evidence in the record relative thereto requires a holding that the parties were dealing with only such oil and gas estate as Petitioner then owned and that they contracted on such basis and the Court of Appeals erred in failing to so hold.**

Argument Under Third Point

Both Petitioner and Respondent have taken the position throughout the course of this litigation that the Operating

Contract and Conveyance is unambiguous. It was held to be so by both the Trial Court and the Court of Appeals.

Petitioner offered, and the Trial Court admitted over the objection of Respondent, evidence of circumstances surrounding the execution of the instrument. Such evidence conclusively shows, without any contradiction, that while the instrument was being prepared and at the time of its execution Respondent's predecessor, through Judge James L. Autry, its General Counsel, who, in connection with Judge T. M. Kennerly, prepared the instrument, knew that some of the lands referred to in the instrument had been awarded to third parties in litigation involving the title to same. It further knew that upwards of 200,000 acres of the lands referred to in the instrument were involved in litigation at the very time of the execution of the instrument. It is undisputed in the record, therefore, that both Petitioner and Respondent's predecessor, at the very time they executed the instrument involved, knew that Petitioner did not own the full and entire oil and gas estate in all of the lands referred to in the instrument.

The lands referred to in the Operating Contract and Conveyance are those lands, and tracts of land, listed and described in a Decree entered by the Circuit Court of the United States for the Southern District of Texas in Cause No. 54, Equity, dated July 28, 1908 (R. Vol. I, p. 165—Appendix iv-v). Such Decree lists more than 1300 separate tracts and parcels of land scattered over 14 or 15 East Texas counties (R. Vol. 1, pp. 200-313). It is not contradicted that Judge Autry, during the course of the preparation of the instrument, knew that title to much of the land listed in the Decree had theretofore been involved in litigation and that title to much of it had been decreed to be in parties other than Petitioner and Southwestern. He knew that Petitioner, at that time, did not own and did not claim to own the entire

oil and gas estate underlying all of the lands, and tracts of land, listed in the Decree of 1908. Judge Kennerly, representing Petitioner in the transaction, told Judge Autry that there had been many changes since 1908, that lands had been lost in litigation, etc., and that he would furnish a list of the changes that had taken place (R. Vol. II, p. 592).

On October 26, 1916, during the preparation of the instrument, Judge Autry wrote Judge Kennerly relative to the description to be used in the instrument. Such letter shows positively that Judge Autry knew that Petitioner and Southwestern did not own all of the lands listed in the Decree of 1908, because he stated in such letter (R. Vol. II, p. 599):

> "* * * *A necessary process in this connection, however, would be a careful search of the list of 1908 in the light of developments since, and the addition of a page or more of notations showing the mutations which have attended this list; that is, the losses by lawsuits sales, etc.*"

While the Operating Contract and Conveyance was being prepared, Judge Kennerly informed Judge Autry that there were lands listed in the Decree of 1908 that were then involved in litigation (R. Vol. II, p. 593), and on May 19, 1917, he wrote Judge Autry (R. Vol. II, pp. 594-597) advising that he had completed the compilation showing pending suits involving lands referred to in the instrument. Such letter shows that there were then pending in various courts 106 suits involving title to 163,108 acres of such land, which did not include tax suits, partition suits and another suit involving about 13,000 acres of land which had finally been disposed of. In the same letter Judge Kennerly explained the delay in having the list of lands printed "with addendum showing all litigation of the Oil Company from the beginning affecting same *as agreed upon*," and further

stated that "the disposed of suits which affect the list of lands mentioned in the Decree are, *by far, more numerous than the pending suits* * * * ."

Based upon the above and other uncontradicted evidence, the Trial Court found that Judge Autry, in preparing the instrument for his principal, knew that approximately 200,000 acres of such lands were involved in various stages of litigation on the effective date of the instrument, and that such suits involved, in some instances, a divided interest in a specified tract of land and, in other instances, undivided interests (Finding XV, R. Vol. I, p. 115).

The Court of Appeals held such evidence of surrounding circumstances inadmissible and not to be considered in aid of the construction of the instrument. In such holding the Court again misconstrued the Texas decisions on the subject of construction of contracts and its holding in such respect is in conflict with the decisions of the Supreme Court of Texas on such question.

The instrument involved is not a simple deed or conveyance. It is a contract between the parties having for its primary, sole and dominant purpose the development of a mineral estate. The conveyancing part of the instrument is only incidental to the chief purpose. The grant of an interest to Respondent's predecessor was necessary to the development contract. The interest so granted cannot be utilized or enjoyed by the owner thereof except as the provisions of the instrument relating to development and division of production are complied with. The rules applicable to the construction of contracts should therefore be applied. It has been held repeatedly, and uniformly so, by our State Supreme Court that evidence of circumstances surrounding the execution of a contract is admissible, even though the instrument be unambiguous, for the purpose of applying the contract to the subject matter and for determining the

meaning the parties attached to the language used, to the end that the intention of the parties might be ascertained.

In holding that it was not necessary for an instrument to be ambiguous to admit of evidence of surrounding circumstances, the Commission of Appeals, in an opinion adopted by the Supreme Court of Texas, in SCOTT v. WALDON, 140 Texas 31, 165 S.W. (2d) 449, 452, said:

> "Whether or not, strictly speaking, the language of the grant is ambiguous need not be discussed, for even though it is not ambiguous on its face parol evidence was nevertheless properly admitted *to apply the language to the subject with which it dealt for the purpose of ascertaining the real intention of the parties.* First National Bank of Amarillo v. Rush, Tex. Com. App., 210 S.W. 521; Ryan v. Kent, Tex. Com. App., 36 S.W. (2d) 1007; Guardian Trust Co. v. Bauereisen, 132 Tex. 396, 121 S.W. (2d) 579; Murphy v. Dilworth, et al., 137 Tex. 32, 151 S.W. (2d) 1004."

In GUARDIAN TRUST CO. v. BAUEREISEN (Tex. Sup.), 142 Tex. 396, 121 S.W. (2d) 579, 583, it is held that:

> " * * * It is proper to consider parol testimony as the circumstances surrounding the parties out of which the contracts grew, *not to add to or vary their terms, but to apply the contracts to the subjects with which they deal for the purpose of ascertaining the real intention of the parties.* First National Bank of Amarillo v. Rush, Tex. Com. App., 210 S.W. 521; Ryan v. Kent, Tex. Com. App., 36 S.W. (2d) 1007. * * * "

The cases of RUDES v. FIELD (Tex. Sup.), 204 S.W. (2d) 5, and RYAN v. KENT (Tex. Com. App.), 36 S.W. (2d) 1007, hold likewise. In the last mentioned case the Court cited REED v. INSURANCE CO., 95 U.S. 23, as authority for

its holding. In such case this Honorable Court held that surrounding circumstances

> " * * * are constantly resorted to for the purpose of ascertaining the subject matter and the standpoint of the parties in relation thereto"

and that

> " * * * without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed."

In the case of MURPHY v. DILWORTH, 151 S.W. (2d) 1004, the Supreme Court of Texas, in construing a mineral reservation in a deed, said (1005):

> "It is true that even though a written contract be ambiguous on its face, parol evidence is admissible for the purpose of applying the contract to the subject with which it deals; and if by reason of some collateral matter an ambiguity then appears, proof of the facts and circumstances under which the agreement was made is admissible, in order that the language used in the contract may be read in the light thereof for the purpose of ascertaining the true intention of the parties as expressed in the agreement. In other words, if the meaning of the language used in a written contract becomes uncertain when an attempt is made to apply it to the subject matter of the contract, though not otherwise uncertain, parol evidence is permissible to aid in making the application. First National Bank v. Rush, Tex. Com. App., 210 S.W. 521; Klueter v. Joseph Schlitz Brewing Co., 143 Wis. 347, 128 N.W. 43, 32 L.R.A., N.S., 383; 22 C. J. 1192. This does not mean, however, that the parties may prove the making of an agreement different from that expressed in the written

> contract, nor that the unambiguous language used in the contract may be violated or the legal effect thereof changed. It merely permits proof of the then existing circumstances, in order to enable the court to apply the language used therein to the facts as they then existed."

The language of the Supreme Court of Texas has application here. To construe the granting clause of the Operating Contract and Conveyance as the Court of Appeals has construed it certainly creates an uncertainty because there is then a variance not only within the granting clause itself but also between such clause and the sections relating to the development and division of production. This creates an ambiguity when an attempt is made to apply the provisions of the sections to the subject matter of the contract as determined by the Court of Appeals. Evidence of surrounding circumstances must then be resorted to in order to ascertain the knowledge of the parties at the time the contract was made and thus determine the subject matter they understood they were dealing with at the time.

Giving application to this Texas rule, and taking into consideration the undisputed evidence of surrounding circumstances, shows beyond any doubt that the parties were dealing with the oil and gas estate then owned by Petitioner in the lands referred to in the instrument. In the face of the knowledge of both Judge Kennerly and Judge Autry that Petitioner did not own the entire oil and gas estate underlying all of such lands, it is unreasonable to assert, believe or conclude that they were dealing with, and contracting on the basis of, the entire oil and gas estate underlying all of such lands, as Respondent now contends and as was held by the Court of Appeals. The surrounding circumstances should be looked to in order to apply the contract of the parties to the subject matter with which they

were dealing and to discover the real and true intention of the parties. Such circumstances show why the grant was limited to the oil, gas and mineral rights in any and all lands "now owned" (then owned) by Petitioner and Southwestern.

The Texas cases of DAVIS v. DAVIS (Tex. Sup.), 141 Tex. 613, 175 S.W. (2d) 226; LEWIS v. EAST TEXAS (Tex. Sup.), 136 Tex. 140, 146 S.W. (2d) 977; ANDERSON v. BRUHLMEYER (Tex. Sup.), 134 Tex. 574, 136 S.W. (2d) 800, and GARZA v. DE MONTALVO (Tex. Sup.), — Tex. —, 217 S.W. (2d) 988, cited by the Court as supporting its holding in this case, are not applicable to the instrument here involved and are not in conflict with the cases cited by us as supporting our contention that evidence of surrounding circumstances is admissible in this case. All of such cases involve simple deeds except the LEWIS CASE which involves a lease and the only question in such case was whether the description contained in the instrument included or excluded an abandoned road right-of-way as a part of the leased premises. Such cases do not involve contracts such as the one involved in this case and they are not in point on the facts.

The case of GARZA v. MONTALVO so cited by the Court is authority, however, sustaining our contention that regardless of what the respective ownership of Petitioner and Respondent in and to the oil and gas estate dealt with would be in the absence of the reservation and exception and the agreement relative to development and equal division of production, the inclusion of such features in the instrument absolutely fixes and establishes an *equal* ownership between the parties. The cited case involved a partition deed by which ten parties, the Garza heirs, partitioned 1163 acres of land. Prior to the execution of the partition agreement some of

the parties owned a greater interest in the land partitioned than the others. The concluding paragraph of the instrument reads as follows (990):

> " 'TWELFTH: IT IS DISTINCTLY UNDERSTOOD, STIPULATED AND AGREED, by all the PARTIES TO this Agreement of Partition, that our respective shares and proportions shall be taken by us, respectively, as herein described by TRACT number IRRESPECTIVE of any previous claim of any of us in any of said lands and premises.' "

With respect to such paragraph, the Court said (993-994):

> " * * * The partition agreement definitely and expressly settled the parties' respective shares and proportions in all of the 1163 acres, 'irrespective of any previous claim' of any of the parties in the segregated tracts. Such a partition between co-owners is binding on all parties thereto regardless of what might actually have been their exact legal shares prior to the agreement."

While the Court of Appeals held that evidence of surrounding circumstances was inadmissible, the Court did not hold that such evidence, if considered, did not sustain Petitioner's contention and did not disturb the finding and conclusion of Trial Court with respect thereto.

It is earnestly submitted that in holding evidence of surrounding circumstances inadmissible and in failing to hold that such evidence requires a finding that the parties were dealing with only such oil and gas estate as was then owned by Petitioner, the Court of Appeals failed to follow the rule of decision prevailing in Texas.

Fourth Point: **There is no factual or legal basis**

for application of the doctrine of estoppel against Petitioner and the decision of the Court of Appeals applying such doctrine is in conflict with decisions of Texas Courts.

Argument Under Fourth Point

The Court of Appeals held that Petitioner "by asserting in its deed that it owned the minerals, and then conveying with a covenant of special warranty a full undivided one-half interest in and to them, absolutely and completely estopped itself by the deed" from claiming that it did not own the whole and could and would sell a full undivided one-half thereof. As we understand the opinion, the Court imposed estoppel for the purpose of nullifying and destroying the reservation and exception of an undivided one-half interest in the minerals.

The "minerals" which the Court held that Petitioner asserted it owned presumably are *all the minerals* underlying lands "described by reference" in the instrument which, as we have pointed out, can only be the lands listed in the Decree of 1908 since no other lands can be said to be "described by reference" therein. The opinion does not point out the language or wording of the instrument held by the Court to constitute a declaration and assertion by Petitioner that it owned all of the minerals. In the light of arguments advanced by Respondent in the Trial Court and the Court of Appeals, it is possible that such holding of the Court is based upon the recital in the purpose clause reading (R. Vol. I, p. 164, Appendix p. iii):

> " * * * now being sole owners of all the oil and gas and all other minerals in and under all of such lands, * * * ."

Such recital is not a representation, assertion or declara-

tion that Petitioner owned all the oil and gas underlying all of the lands referred to or "described by reference" in the instrument. That such meaning cannot be imputed to such language is too plain and obvious to admit of serious argument to the contrary. Even if it be assumed that the words "now being sole owners" are tantamount to a representation, it must be noticed that such words refer to the oil and gas and other minerals in and under *"all such lands."* To what lands, then, do the words "all such lands" refer, and what lands are included in such phrase? It is obvious that they cannot refer to any lands save and except such lands as might have been mentioned, described or referred to in that part of the instrument preceding them.

The instrument, preceding these words, makes the following, and only the following, references to lands (R. Vol. I, pp. 161-164; Appendix i-iii):

> (1) A large acreage of lands of which Grantor (Petitioner) *has heretofore been the owner,*
>
> (2) Lands of which Grantor *has heretofore been the owner* and sold by it prior to August 4, 1916, but in most cases reserving the minerals,
>
> (3) Lands sold by Grantor to Southwestern by deed dated August 4, 1916, and being all of the *lands at that time owned by it,*
>
> (4) A large amount of land never owned in fee by Grantor and Southwestern but in which they are the *owners* of mineral rights, and
>
> (5) Certain lands *once owned* by Grantor and Southwestern, in the sale of which the mineral rights were reserved.

As stated, the words *"all such lands"* appearing in the above quoted portion of the purpose clause can refer to nothing other than the lands mentioned in the five groups above.

An examination reflects that the five groups mentioned no land except lands of which Petitioner was one time the owner. They do not, as plainly appears from the language used, refer to any lands not at one time owned by Petitioner, except that Group (4) refers to land never owned by Petitioner but in which Petitioner and Southwestern *own* mineral rights, such mineral rights being those *vested* in Petitioner and those *acquired* by Petitioner.

Group (1) refers to lands of which Petitioner was once the *owner*. Group (2) refers to lands of which Petitioner had been the *owner* and in the selling of which Petitioner had reserved the minerals. Group (3) refers to lands *owned* by Petitioner at the time it conveyed to Southwestern on August 4, 1916. Group (4) refers to mineral rights of which Petitioner and Southwestern are the *owners*, in land never owned by them in fee. Group (5) refers to lands *once owned* by Petitioner and Southwestern, in the sale of which the mineral rights were reserved.

We fail to see how any course of reasoning or logic could lead to the conclusion that any lands or mineral rights were referred to except lands and mineral rights *owned* by Petitioner and Southwestern. The language used will not admit of any other meaning or construction.

It may be argued by Respondent that the reference to the deed from Petitioner to Southwestern, of date August 4, 1916, is tantamount to and constitutes a representation, assertion or declaration that Petitioner was the owner of all the oil and gas underlying all of the tracts of land listed in the Decree of 1908. Such deed (R. Vol. I, pp. 190 and 86-105) purports to convey (88):

> " * * * in fee simple, the title to, and possession of, all the hereinafter described tracts of land * * *, save and except all oil and gas on, in and under the same, all

of which are expressly reserved from this conveyance, * * * ."

The following also appears in the granting clause:

> "The lands referred to above, and intended to be included herein are all the land, and interest in land, subject to the reservations aforesaid, *owned* or *claimed by*, or *in the possession of*, the Houston Oil Company of Texas anywhere either in the State of Texas or in the State of Louisiana, most of which are more particularly described in the Decree * * * dated the 28th day of July, A. D. 1908, * * * ."

It will be noted that the lands intended to be conveyed by said deed are lands *owned* or *claimed by* or *in the possession of* Grantor (Petitioner) anywhere in the State of Texas or in the State of Louisiana and the instrument recites that most of such lands *owned, claimed by,* or *in the possession of* Grantor are more particularly described in said Decree of 1908. This deed, as will be seen from the plain import of the language used, does not represent that Petitioner then owned all of the lands listed in the Decree. It merely says that *most* of the lands *owned* or *claimed by* or *in the possession of* Petitioner at said time are more particularly described in the Decree; in other words, that most of such lands so owned, claimed by or in its possession are within the lands described by the Decree. It is submitted that the words "now being sole owners of all the oil and gas and all other minerals in and under all of such lands" do not, and cannot be made to, constitute a representation, assertion or declaration that Petitioner owned all of the oil and gas underlying all of the lands, and tracts of land listed in the Decree of 1908; neither do such words constitute a representation, assertion or declaration that Petitioner was the owner of all of the oil and

gas underlying the lands "described by reference" in the Operating Contract and Conveyance.

In any event, the construction placed by the parties to the Operating Contract and Agreement upon the deed from Petitioner to Southwestern limits such deed to a conveyance of the lands owned by Petitioner on the date thereof because it is recited in the Operating Contract and Conveyance, that by such deed, Petitioner conveyed to Southwestern "all of the lands at that time owned by it". Respondent's predecessor was a party to, and executed, the instrument containing this recital. In GULF COAST WATER CO. v. HAMMAN EXPLORATION CO. (Tex. Civ. App.—er. ref.), 160 S.W. (2d) 92, 96, it is said:

> "It has also been held that this construction may be effected by placing of record in one's chain of title an instrument containing recitals as to the effect of a former conveyance in the chain."

Other authorities so holding are:

Way v. Venus (Tex. Civ. App.), 35 S.W. (2d) 467;
Rio Bravo Oil Co. v. Weed (Tex. Sup.), 50 S.W. (2d) 1080;
14 Tex. Jur. 925, Sec. 146.

Such recitals "bind both parties and parties claiming under such deeds," HENDERSON v. BOOK (Tex. Civ. App.—er. ref.), 128 S.W. (2d) 117, 120.

These references to lands and minerals *owned* are very significant as showing the intention of the parties to the operating Contract and Conveyance to deal with, and only with, such oil and gas and other minerals as owned by Petitioner and Southwestern on the date of the instrument. They also explain and illuminate the meaning the parties attached

to the granting clause, and conclusively show that the parties intended a conveyance of an undivided one-half interest in the minerals "now owned", on the date thereof, by Petitioner and Southwestern.

If the claimed assertion or declaration of sole ownership, or ownership of the whole, of the minerals underlying all of the lands listed in the Decree of 1908 is based upon the phrase "particularly including * * * all those certain tracts of land * * * described in a Decree", etc., appearing in the granting clause of the instrument, it is submitted that such phrase does not constitute such an assertion or declaration. The grant is actually an undivided one-half interest in the oil, gas and minerals in and under the lands "NOW OWNED". As pointed out, and supported by cited authority, in Argument Under First Point, the reference to the Decree, being a general description, does not enlarge the grant.

The conveyancing part of the instrument is a quit-claim of an undivided one-half interest in the oil and gas rights then owned by Petitioner. That a quit claim cannot be the basis for imposing an estoppel against the grantor is well established by Texas Authorities. 14 TEX. JUR. 905, Sec. 126, and authorities there cited.

Certainly, it cannot be said that the granting clause *clearly* and *plainly* purports to convey an undivided one-half interest in the minerals underlying all the lands listed or described in the Decree of 1908. To attach such construction to it necessitates striking out the words "now owned," which must not be done under the authorities hereinabove cited. To construe the granting clause as purporting to convey such interest in all the minerals underlying all the lands listed in the Decree renders the description self-contradictory. Such description will not support an estoppel. This is the holding in KUYKENDALL v. SPILLER (Tex. Civ. App.—er. ref.), 299 S.W. 522, 527, wherein it is said:

> " * * * It is also the rule that the instrument under which the estoppel is claimed must be clear and unambiguous, and that if the description of the property contained in the instrument is self-contradictory, the deed will not support an estoppel."

The Court of Appeals cited several cases as authority for its application of estoppel against Petitioner. We will discuss only the two cases quoted from in the opinion as they are illustrative of the others. The Court cited LINDSAY v. FREEMAN (Tex. Sup.), 83 Tex. 259, 18 S.W. 727, on the proposition that a general warranty is not necessary to the application of estoppel. We are in full accord with the cited decision. It correctly announces the law with respect to the deed there involved but it is not authority for destroying Petitioner's reservation by estoppel. In such case the deed involved purported to convey the entire lands involved whereas the instrument here involved purported to convey only a part of that which was *owned* by the grantors. In the cited case there was no reservation to the grantors whereas in this case the grantors reserved an interest equal to that which was conveyed. The great difference between the LINDSAY CASE and this case is that in the cited case the party against whom the estoppel was invoked was attempting to assert title to and to re-acquire that which his predecessors in title had already conveyed. Not so in this case, because Petitioner is merely seeking to hold that which it reserved, and did not convey against the attempt of Respondent to obtain more from it than it conveyed.

The Court cited DUHIG v. PEAVY-MOORE LBR. CO. (Tex. Sup.), 135 Tex. 503, 144 S.W. (2d) 878, as authority for nullifying and destroying the reservation and exception contained in the Operating Contract and Conveyance by the application of the doctrine of estoppel. Such decision has no

application here. There the deed involved contained a covenant of general warranty. The instrument here involved contains no such covenant of general warranty but only a limited special warranty against those claiming by, through or under Petitioner and Southwestern. There has been no breach of the warranty contained in the instrument here involved because the loss of the 3/35ths interest in the Arriola League as a result of the THOMAS CASE was not to persons claiming by, through or under Petitioner and Southwestern. The doctrine of estoppel was invoked in the DUHIG CASE because the court held that there was a breach of the warranty. That is the basis for the holding and decision of the Court and the only basis and the opinion holds, by inference if not expressly, that if there had been no warranty in the Duhig deed the doctrine of estoppel would not have been applicable.

The facts in the cited case show that at the time Duhig executed the deed there involved he owned the surface and one-half of the minerals. His deed by the granting clause purports to convey the entire fee simple title, that is the surface estate and all of the mineral estate. A later clause in the deed provided that "grantor retains an undivided one-half interest in the minerals." The Court held this to be a reservation in favor of Duhig and further held that by the deed the grantee actually acquired only the surface estate; but, it held further that at the very time of the execution and delivery of the deed the warranty (which was a general warranty) was breached because the deed warranted the title to the surface and also to an undivided one-half interest in the minerals. The Court then quoted the following from AMERICAN JURISPRUDENCE:

> " * * * 'It is a general rule, supported by many authorities, that a deed purporting to convey a fee simple

> or a lesser definite estate in land *and containing covenants of general warranty of title or of ownership will operate to estop the grantor* from asserting an after-acquired title or interest in the land, or the estate which the deed purports to convey, as against the grantee and those claiming under him.' Vol. 19, p. 614, Sec. 16."

The Court explained the meaning of the above quoted rule and said the following with respect thereto:

> "* * * What the rule above quoted prohibits is the *assertion* of title *in contradiction or breach of the warranty*. If such enforcement of the warranty is a fair and effectual remedy in case of an after-acquired title, it is, we believe, equally fair and effectual and also appropriate here."

With respect to Duhig's reservation the Court said:

> "* * * The decision here made assumes, as has been stated, that Duhig by the deed reserved for himself a one-half interest in the minerals. The covenant is not construed as affecting or impairing the title so reserved. It operates as an estoppel denying to the grantor and those claiming under him the right to set up such title against the grantee and those who claim under it."

It is too apparent to admit of argument to the contrary that the doctrine of estoppel was applied against Duhig's reservation because of a breach of his covenant of warranty. It follows that the decision of the Court would have been different had there been no breach of warranty. It must be concluded that if there had been no covenant of general warranty, which the Court held was breached at the very time of the execution and delivery of the deed, the Court would not have held that Duhig's reservation, or any part of it, would pass to his grantee and those claiming under it.

The DUHIG CASE is authority for the proposition that the doctrine of estoppel cannot be imposed against Petitioner for the purpose of taking a part of its reserved interest and giving same to Respondent, so as to satisfy the contention now asserted by it.

If estoppel is proper in this case it should be imposed against Respondent. The instrument here involved is not a deed poll, it is a contract executed by respondent's predecessor as well as by Petitioner. The recitals in the instrument are the recitals of both parties. In UNITED FIDELITY LIFE INS. CO. v. FOWLER (Tex. Civ. App.), 38 S.W. (2d) 128, 131, it is said:

> "The rule of estoppel by contract is announced in 21 C. J. 1111, Sec. 111, as follows: 'If, in making a contract, the parties agree upon or assume the existence of a particular fact as the basis of their negotiations, they are estopped to deny the fact so long as the contract stands, in the absence of fraud, accident or mistake.'"

And further:

> "The phrase 'estoppel by contract,' employed in this connection, means no more than that a party is bound by the terms of his own contract until set aside or annulled for fraud, accident, or mistake. Estoppel by contract is not, strictly speaking, an estoppel in pais, because it lacks several of the essential elements of an estoppel in pais but is regarded merely a form of quasi estoppel based on the idea that a party to a contract will not be permitted to take a position inconsistent with its provisions, to the prejudice of another."

In GREENE v. WHITE (Tex. Sup.), 137 Tex. 361, 153 S.W. (2d) 757, involving a deed poll wherein grantor conveyed to grantee a tract of land and reserved the minerals,

the Court held that the parties to the deed, and their privies, were bound by such contractual obligations in the deed even though the grantor did not own the land. The Court, in this connection, said:

> " * * * The recitals which give the surface estate to Garrett and reserve the mineral estate to Greene are likewise contractual. They define the character and extent of the ownership and interests of the parties in the land affected by the deed. Kahn v. Kahn, 94 Tex. 114, 58 S.W. 825."

It is submitted that the decision of the Court of Appeals, in applying an estoppel against Petitioner and thereby destroying its reservation, is in conflict with applicable local decisions.

***Fifth Point*: The judgment and opinion of the Court of Appeals do not constitute a judgment fully declaratory of the rights, obligations and other legal relations of Petitioner and Respondent under the instrument involved and, therefore, the judgment is not in compliance with the Declaratory Judgment Act.**

Argument Under Fifth Point

Petitioner prayed for a judgment declaring the legal effect of two instruments (R. Vol. I, pp. 21-24) as permitted under the provisions of Section 400, Title 28 U. S. C., in effect at the time this suit was filed, now Section 2201, JUDICIARY AND JUDICIAL PROCEDURE, Title 28, U.S.C.

The judgment of the Trial Court was in compliance with the provisions of the Code in that its judgment was such as to be declaratory of the rights, obligations and other legal relations of Petitioner and Respondent with respect to all

operations under the instruments. The judgment (R. Vol. III, p. 1540) and opinion (R. Vol. III, pp. 1524-1539) of the Court of Appeals, however, do not constitute a declaratory judgment under the Cole provisions because they are not declaratory of the rights, obligations and other legal relations of the parties that might arise as a result of operations under the Operating Contract and Conveyance.

Such Court has held that the instrument conveyed a full "undivided one-half interest in and to" the minerals in and under the lands described by reference. No lands are described by reference except those listed in the Decree of 1908. The Court does not adjudicate the quantum or extent of the conveyance in any other lands than those listed in the Decree. It follows that the opinion and judgment of such Court are not declaratory of the rights of the parties with respect to production obtained from a designated unit including lands not listed in the Decree and in which Petitioner did not own all the oil and gas rights on the effective date of the instrument.

It does not appear from the opinion that the Court held that the instrument conveyed "a full undivided one-half interest" in the minerals underlying those lands mentioned in categories (2) and (3) in the granting clause, that is lands *once owned* but in the sale of which the minerals were reserved and minerals *owned* under lands never owned. The opinion and judgment of the Court do not declare the rights of the parties with respect to production from a designated unit in which are included lands in such two categories and in which Petitioner did not own the full oil and gas estate.

It is submitted that the Court of Appeals has not rendered a full and complete declaratory judgment as contemplated by the applicable code provisions, and the error

arising out of its failure to do so calls for a review of its opinion and judgment by this Honorable Court.

Conclusion and Prayer

We regret that this Brief has been extended to such length but, due to the necessity of discussing general rules of construction, the various parts and features of the instrument, and facts shown by parol evidence, we felt constrained to extend it in order to demonstrate beyond question that the Court of Appeals did not follow applicable Texas decisions.

This case is a very important matter both to Petitioner and Respondent involving, as it does, their operations under the Operating Contract and Conveyance covering a vast mineral estate. The construction of this instrument by the Court of Appeals is such that much difficulty will be encountered in further development. The very tract of land involved in the litigation giving rise to the controversy here in litigation was drilled and developed at the joint and equal expense, risk and liability of the parties and the production operations likewise conducted. To say that Petitioner, as in this instance, must pay one-half of the cost and expense and receive less than one-half of the production is not in accordance with the terms of the contract and agreement between the parties.

The intention of the parties to the instrument is shown in unmistakable language and the contention made by Petitioner is in keeping with and supported by such intention. If the intention of the parties be gathered from the instrument in its entirety and effect be given to such intention, we think Petitioner's contention must be sustained.

The record shows without dispute that Judge Autry, as General Counsel of Respondent's predecessor, had certain knowledge, imparted to him by Judge T. M. Kennerly, that Petitioner and Southwestern did not own, or claim all of

the lands listed in the Decree of 1908 and further that nearly 200,000 acres of such land was then in litigation. Respondent's predecessor, therefore, knew that Petitioner was not contracting on the basis of all the lands described in the Decree and that the parties were dealing with the mineral estate in and to only such lands as were then owned; or, in other words, only such mineral estate as Petitioner and Southwestern then owned.

The record further shows (R. Vol. II, pp. 605-607) that the Board of Directors of Respondent's predecessor entered into the contract on the basis of an equality of ownership between it and Petitioner as evidenced by the Resolution authorizing the execution of the instrument which recites that it provides (606):

> "(4) For *the equal ownership of such minerals in such lands by the parties of the First Part and the Grantees respectively,* after the development fund is fully expended, and with the right of either owner to proceed with developing work at joint expense with terms under which, if either party should decline so to do the other will be at liberty to so proceed, but upon the basis of the party operating owning the entire working interest and paying to the other party a one-sixteenth royalty."

That there is merit in the Petition presented in this case is evidenced by the fact that of the four Judges passing on the case two have construed the instrument as Petitioner contends for: the Trial Judge and one of the Circuit Judges. It is quite true that the Judge who wrote the majority opinion of the Court of Appeals is a Texas lawyer with considerable experience on the Federal Bench, but it is also true that the Trial Judge who rendered the judgment for Petitioner is likewise a Texas lawyer with considerable experience on the State Bench, as well as on the Federal Bench.

Under the record in this case, including the instrument itself, we are compelled to say that the Court of Appeals erred in failing to follow the rule applied by it in DOYLE v. STANOLIND OIL & GAS CO., 123 F. (2d) 900, 903, when it said:

> "On the merits, the case is ruled by Texas decisions which have long established that in determining the scope and effect of a conveyance, there are no artificially controlling rules. *The settled law here is that the intention of the parties is derived from the instruments, in the light of the circumstances under which they are executed and acted upon,* is controlling * * * ."

That an important question of local law is involved in this case cannot be denied and it is sincerely and strenuously urged that the Court of Appeals has decided such question in a way that is in conflict with applicable local decisions.

Petitioner respectfully prays as in its Petition for Writ of Certiorari.

Respectfully submitted,

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Appendix to Brief

THIS OPERATING CONTRACT AND CONVEYANCE, made and executed at Houston, Texas, as of date November 15, 1916, between

HOUSTON OIL COMPANY OF TEXAS, a corporation organized and existing under the laws of Texas (hereinafter sometimes called "Grantor"), and

SOUTHWESTERN SETTLEMENT & DEVELOPMENT COMPANY (not incorporated), a Trust Estate established by a Declaration of Trust which bears date July 14, 1916, and which is recorded in the Deed Records of Harris County, Texas, Volume 369, page 367, et seq., to which Declaration of Trust and such record thereof reference is hereby made (hereinafter sometimes called "Trust Estate"), the two being Parties of the First Part, and

REPUBLIC PRODUCTION COMPANY, a corporation organized and existing under the laws of Texas (hereinafter sometimes called "Republic"), and

FEDERAL PETROLEUM COMPANY, a corporation organized and existing under the laws of the State of Louisiana, the two being Parties of the Second Part herein, and collectively hereinafter sometimes called "Grantees" and severally "Grantee."

WHEREAS, the Grantor has heretofore been the owner of a large acreage of lands in the States of Texas and Louisiana, some of which are located in the respective Counties and Parishes thereof in acreage amounts approximately as follows:

Angelina County, about . .	2,877 acres	
Brazoria County, about . . .	15 acres	
Clay County, about	320 acres	
Hardin County, about . .	178,394 acres	
Jasper County, about . . .	226,722 acres	
Jefferson County, about . .	7,298 acres	
Liberty County, about . . .	10,948 acres	
Nacogdoches County, about .	3,437 acres	
Newton County, about . .	141,080 acres	
Orange County, about . .	18,682 acres	
Polk County, about . . .	20,349 acres	
Sabine County, about . . .	35,130 acres	
San Augustine County, about .	37,586 acres	
Tyler County, about . . .	92,192 acres	
TOTAL in Texas, about .		775,030 acres
Beauregard and Cameron Parishes, about	15,249 acres	
TOTAL in Louisiana, about		15,249 acres
TOTAL IN BOTH STATES, about		790,279 acres

AND WHEREAS, prior to August 4, 1916, Grantor made sale of some of the lands above mentioned (relatively small in total quantity), to various parties, but in most cases under conveyances expressly reserving minerals in and under the lands so sold, and with the right of making sale and disposition of such minerals; and,

WHEREAS, by deed dated August 4th, 1916, hereby referred to and made part hereof, the said Grantor sold to the Trust Estate above mentioned, all of the lands at that time owned by it in the States of Texas and Louisiana, but in said deed expressly reserving all of the oil and gas in and under such lands, with perpetual rights of ingress and egress to prospect for and use and remove the same, as fully as if such conveyance had not been made, and also reserving the right of erecting upon the premises all such buildings, der-

ricks, tanks, reservoirs, pipe lines, telegraph and telephone lines, or other improvements and equipment of every character which the Grantor, its successors or assigns, might find necessary, proper or convenient in taking, using, enjoying or removing said oil and gas from said lands, with perpetual rights of ingress and egress to utilize such rights; and,

WHEREAS, grantor and the Trust Estate are the owners of mineral rights in a large amount of land situated in the State of Texas the fee in which they never owned, a more particular description of some, but not all, of which is as follows:

(a) Those mineral rights vested in Grantor by virtue of Paragraph 33 of a Decree entered July 28, 1908, in the Circuit Court of the United States for the Southern District of Texas, at Houston, in Cause No. 54, Equity, Maryland Trust Company, Trustee, v. Kirby Lumber Company, et al., and generally known as mineral rights in Kirby Lumber Company and Kountze lands;

(b) Certain mineral rights acquired from the Beaumont Lumber Company in Jasper County, Texas; and

WHEREAS, Grantor and the Trust Estate are the owners of mineral rights in certain lands the fee in which the Grantor and Trust Estate once owned, but in selling which the mineral rights were reserved, situated in the Counties in the State of Texas and Parishes in the State of Louisiana hereinbefore named and set forth; and

WHEREAS, the Parties of the First Part, collectively but severally as aforesaid, now being sole owners of all the oil and gas and all other minerals in and under all of such lands, in order to promote and advance the development of same, propose now to convey to the grantees herein, severally as hereinafter set forth, a full undivided one-half interest in and to all of the oil, gas, and mineral rights, whether me-

tallic or non-metallic, in the manner and under the terms as hereinafter set forth, thereby making or seeking to make more valuable the other one-half of all such not thus sold, but reserved.

NOW, THEREFORE, in consideration of the premises and of the sum of TWO HUNDRED FIFTY THOUSAND DOLLARS, which the Grantees jointly and severally, by the execution of this instrument, hereby agree to pay to the Maryland Trust Company, Trustee, to be by it applied as has been or shall be agreed between the Grantor, the Trust Estate, and said Trustee, upon obligations for which said Grantor and Trust Estate are bound, but for application of which moneys or others that may be paid as hereinafter provided, such Grantees, their successors and assigns, shall have no responsibility, the receipt of which is acknowledged in the release executed and delivered herewith by said Maryland Trust Company, and the further consideration of certain Deferred Payments hereinafter mentioned, and the further terms hereof, the said Grantor and said Trust Estate, here acting respectively by representatives thereunto duly authorized, have granted, bargained, sold, and conveyed, and do hereby grant, bargain, sell, and convey, A FULL UNDIVIDED ONE-HALF INTEREST IN AND TO ALL OF THE OIL AND GAS AND MINERAL RIGHTS, WHETHER METALLIC OR NON-METALLIC, IN AND UNDER ANY AND ALL LANDS NOW OWNED BY THEM OR EITHER OF THEM (expressly and only excepting lands in Navarro County, Texas), in the State of Texas and in the State of Louisiana, particularly including (without excluding others not specifically described) all those certain tracts of land which are more particularly described in a Decree entered by the Circuit Court of the United States for the Southern District of Texas, at Houston, in Cause No. 54, Equity, entitled "Maryland Trust Company,

Trustee, Complainant, v. Kirby Lumber Company and Houston Oil Company of Texas, Defendants," dated the 28th of July, 1908, to which reference is hereby made, and also to the record of said Decree in the public records of Texas and Louisiana, as follows:

(Here follow references to the records of the various Counties in Texas and Parishes in Louisiana, which references are here omitted because deemed unimportant) and also any and all oil, gas, and mineral rights, whether metallic or non-metallic, now owned by the said Grantor or Trust Estate in any lands in the State of Texas the fee in which they never owned, save and except in the County of Navarro, State of Texas; and also any and all oil, gas, and mineral rights, whether metallic or non-metallic, now owned by said Grantor or Trust Estate in lands in the State of Texas the fee in which Grantor or Trust Estate once owned but in the sale of which the mineral rights were reserved, save and except the lands in the County of Navarro, State of Texas.

UNTO THE GRANTEE, REPUBLIC PRODUCING COMPANY, SAID UNDIVIDED ONE-HALF OF SUCH MINERALS IN ALL SUCH LANDS AS ARE SITUATED IN THE STATE OF TEXAS (except in Navarro County, as aforesaid), and

UNTO THE GRANTEE, FEDERAL PETROLEUM COMPANY, SAID UNDIVIDED ONE-HALF OF SUCH MINERALS IN ALL SUCH LANDS AS ARE SITUATED IN THE STATE OF LOUISIANA.

Together with all and singular the perpetual right with Grantor and Trust Estate of possession and of ingress and egress at all times for the purpose of exploring, drilling, mining, and in every way operating for such minerals upon such premises and every part thereof, and to remove such minerals from the same, and with the right of erecting upon the premises all such buildings, derricks, tanks, reservoirs, pipe lines, telegraph and telephone lines or other improve-

ments and equipment of every character which such Grantees respectively, their successors and assigns, may find necessary, proper or convenient for the exploration, using, enjoying or removing any and all such minerals, together with every incidental right essential to the complete enjoyment of the properties and privileges conveyed.

Grantees, respectively, shall have the right particularly to lay pipe lines over and upon all the premises at will, and to assign such right in whole or in part to another or others, and in the conduct of operations on the premises to have free use and privilege of water and fuel and waste timber (not covered by Kirby Lumber Company contract and not previously sold) and for the appropriation and use of all necessary quantities of surface for locations for pump stations, tanks, reservoirs and other operating and storage structures, but all such rights shall be exercised with due care, and reasonable compensation made to the then owner of the fee for any damage or injury that may be caused, including compensation to any such owner, other than Grantor or Trust Estate, for the surface appropriated, and Grantees shall, on request of the owner of the surface, bury all pipe lines to a depth of twelve inches, or more if necessary, to permit the unhindered enjoyment of the surface estate; but as to the Beaumont, Port Arthur and Sabine Pass Ship Channel, Grantees shall be confined to the exercise of such rights as proper parties may hereafter agree upon.

To Have and to Hold, all and singular, the premises unto the said Grantees respectively, their successors and assigns forever.

And the Grantor, as to oil and gas, and the Trust Estate as to all other said minerals, do respectively warrant the title to such and to the privileges granted as against all persons claiming the same, or any part thereof by, through

or under such Grantor and Trust Estate, respectively, except as to such titles and privileges as may have been divested out of them prior to October 20, 1916, and guarantee the premises conveyed to be free of contract liens.

The further terms of this contract are as follows:

1. The Deferred Payments above mentioned shall consist of expenditures to be made by one or the other, or both, of the Grantees above mentioned in prospecting and developing the minerals upon said premises (or else in cash), and the total amount of such Deferred Payments so to be made shall be made by one or the other, or both, of said Grantees, and shall aggregate the sum of Two Hundred and Fifty Thousand Dollars, and be made within periods as follows:

On or before December 31, 1917, a total of not less than twenty per cent of the whole;

On or before December 31, 1918, a total of not less than forty per cent of the whole;

On or before December 31, 1919, a total of not less than sixty per cent of the whole;

On or before December 31, 1920, a total of not less than eighty per cent of the whole;

On or before December 31, 1921, a total of not less than one hundred per cent of the whole, and to secure compliance herewith a vendor's lien is expressly retained upon the property and rights herein conveyed.

Grantees shall have the privilege at will of paying all or any part of such amounts in cash, as aforesaid, instead of so expending such in development work (and such as may be in cash shall be paid to the Grantor and the Trust Estate and their joint receipt taken, and Grantees are not to be responsible for any division or apportionment between them). Any amounts not so expended in development must be paid in cash in sufficient sums to complete the several minimum

amounts above prescribed. The amount to be expended in development work shall be accounted for and applied as hereinafter provided. Payments of cash made for the purpose of completing minimum amounts shall be deemed seasonably made if so made within sixty days after the final fixed dates above mentioned, thus giving a reasonable period for the completion and adjustment of accounts involved.

2. All such lands for the purposes hereof shall be divided into units of approximately 640 acres. Each and all such units shall have separate consideration and application hereunder. Each separate tract of less than 640 acres shall be deemed a separate unit. Each separate tract originally designed to be 640 acres shall be deemed a separate unit, regardless of any surplus or deficiency in actual acreage. Where larger surveys have not been subdivided, such units shall conform to survey lines as near as may be and shall be as many in number as the acreage may permit, but along any boundary line the acreage of units may each be less, conforming with the extended lines of other units. Contiguous surveys aggregating more than 640 acres may be laid out into units regardless of interior boundary lines. Before operations are begun on any tract of land, its unit lines shall be defined and a map thereof made, and such may be done by computations and without actual surveys. The Grantees (respectively) shall establish the unit locations and shall furnish to other parties copies of maps thereof. After unit lines have been defined such shall not be changed without consent of parties at interest.

3. Prior to and until the completion of the Deferred Payments (but in no event after December 31, 1921, except as otherwise provided in Section 8 hereof), all operations on the premises for the development of such minerals shall be conducted by the Grantees, and the interest of the

Grantees shall be that of an undivided one-half, and the interest of the Grantor and Trust Estate shall collectively be that of an undivided one-half (but severally as herein stated), in and to the particular unit or units being developed; and all expenses of such development and all risk and liability arising out of such development shall be paid as follows: Statements in usual form and proper detail as to items shall be rendered monthly to the Grantor and the Trust Estate, by the Grantee conducting such development, showing the expenditures made by the Grantee; the total of such expenditures plus ten per cent (to cover usual superintendence or overhead expense) shall be deemed a credit upon and be applied to the reduction of such Deferred Payments until such are wholly cancelled, either by the application of such credits or by payments of cash (as herein provided), and if the credits, together with former payments of cash, if any, be not sufficient to complete payment of the minimum amounts within the time limits fixed, then additional payments of cash shall be seasonably made. Any items of accounting and the application thereof not excepted to within sixty days from rendition of such to Grantor and Trust Estate shall be conclusively deemed approved by all concerned.

If oil, gas or other of such minerals hereinbefore mentioned are developed prior to the completion of such Deferred Payments, or with or by the expenditure of such Deferred Payments, the operations of same to secure a production therefrom (as distinguished from development thereof), shall thereafter be conducted by the Grantees upon the particular unit or units upon which same are located, and all expense and risk and liability arising out of such operations to obtain a production shall be borne, one-half by Grantees and the other half by Grantor and Trust Estate.

Statements in usual form and proper detail as to items of expense shall be rendered monthly to the Grantor and Trust Estate by the Grantee conducting such work, showing expenditures made by the Grantee, and one-half of the total of such plus ten per cent of such one-half (to cover usual superintendence or overhead expense) shall be payable, on demand, by Grantor or Trust Estate to such Grantee. Any items of accounting and the application thereof not excepted to within sixty days from the rendition of such to Grantor and Trust Estate shall be conclusively deemed approved by all concerned.

4. Accurate accounts shall be kept and rendered monthly by the Grantees, respectively, of all production of minerals of all kinds upon premises or units which may have been developed and rendered producing by the expenditure of such deferred payments. Grantees, respectively (by which operations are conducted and in which title is vested), shall own and appropriate one-half thereof, and the other half shall be owned and appropriated by the Grantor as to oil and gas, and by the Trust Estate as to all other minerals, such oil and gas to be delivered on the surface to Grantor by Grantee or into such pipe lines available, if any, upon the unit from which such production arises, free of cost to Grantor, and such other minerals to be delivered on the surface to the Trust Estate by Grantee. It is assumed that, primarily, the operations will be in search of oil and gas, but other minerals covered by this contract may be discovered and developed, and Grantor and Trust Estate are each to be furnished with copy of such accounts. As between Grantor and Trust Estate, their part of the expenses of production shall be divided so that Grantor shall bear all expense of the production of oil and gas, and the Trust Estate all expense of the production of other such minerals. All expenses of

production, as herein provided, shall be secured by a lien upon the products as and when produced, such to be satisfied prior to removal thereof.

5. It is understood that Grantor has heretofore, at its own cost and expense, drilled certain oil wells upon Lot Nine (9), in Mary E. Hopkins Survey No. 2, Hardin County, Texas (Saratoga), and that Grantor has and owns certain development property and equipment situated at Saratoga. All of such development property above the surface shall be inventoried at present value, and an amount equal to one-half of such value shall be paid to Grantor at Houston, Texas, by Republic, but same shall not be paid out of such Deferred Payments, nor shall Grantee be entitled to a credit on such Deferred Payments by reason thereof. As soon as possible after date of delivery hereof, all operations on said Lot Nine shall be taken over and conducted by Republic under the terms of Sections Three (3) and Four (4) hereof, and thereafter all such development property and equipment shall be used and operated upon joint account, and all production from such wells on said Lot Nine shall be equally owned by Grantor and Republic. It is understood that Grantor has certain oil in storage upon said Lot Nine, and that same is to be retained by Grantor, and Grantees shall have no interest therein. It is further understood that there is on deposit with certain Banks or Trust Companies a certain escrow fund of one-eighth, awaiting the result of litigation involving said Lot Nine; it is understood that Grantees have no interest in said escrow fund.

6. After completion of Deferred Payments (unless development shall be continued with the fund created under Section Eight (8) hereof, and in that event after such fund is expended), title and ownership of all minerals upon all of the properties covered hereby shall be deemed fixed and final in the terms and proportions as herein provided, and

Parties of the First Part or the Grantees, respectively, may proceed with operations upon any one or more of the units (except as hereinafter provided), but in the event of determination so to do must give to the other party written notice of such intention in this respect. If within thirty days after such notice is given, such other party shall elect to join in such operations, and shall so declare in writing to the party giving notice, then all such operations thereafter on said unit shall be upon joint account and be conducted as to expense, risk, and liability, accounting, and production in the same manner as provided in Sections Three (3) and Four (4) hereof. If, however, the party to whom such notice is given shall not within such time elect to join and the party giving such notice shall proceed to develop, then the right of the party to whom such notice is given to so join, and the existing interest of the party to whom such notice is given in the minerals upon such unit or units, shall terminate, and all such interest shall vest exclusively in the party conducting such development operations subject only to royalty to the other party of one-sixteenth of all mineral products produced and saved. If after giving such notice the party giving same shall not within ninety days thereafter commence and actively prosecute operations in compliance therewith, such notice from that time shall be considered as cancelled and of no more effect than if it had never been given. All royalties shall be deliverable on the premises.

Operations properly begun by either Grantee before the completion of Deferred Payments, or out of the fund provided in Section Eight (8) hereof, and by any party entitled to do so thereafter, upon any one or more units shall be thereafter conducted exclusively by such party upon such unit or units.

7. In order to properly protect lines, it is agreed that if

Parties of the First Part, or either of them, or either Party of the Second Part, shall acquire the mineral rights of any lands adjacent to these mentioned herein, the other party shall have the right to acquire a one-half interest and bring under the terms hereof all of the mineral rights in any such newly acquired properties, but only upon payment to the party acquiring such of one-half of the cost, and assuming one-half of the liabilities thereof, and must elect so to do within thirty days, and make such payment, if any, voluntarily, or within sixty days, of a date upon which the party acquiring such shall give notice of such acquisition. If no such election is made, the newly acquired property shall be free of this contract.

8. At any time within one hundred and eighty (180) days after the completion of Deferred Payments, upon written demand of the Parties of the First Part, or either of them, to either of the Parties of the Second Part, or vice versa, a total additional Development Fund of Two Hundred and Fifty Thousand Dollars, or of such smaller amount as may be agreed upon between the party making such demand and the other party or parties to whom such demand is addressed, shall be created; one-half of such fund shall be subscribed by the party making such demand and the other half by the party to whom such demand is addressed; which fund shall be payable on demand of the party conducting operations, and be made to the Grantees, or one of them, by whom it shall be expended under the same terms as the Deferred Payments herein (other than cash, if any) are to be expended.

Unless otherwise hereinafter agreed, the fund created hereunder shall be payable in installments by the respective parties in equal amounts, upon demand of the party conducting the operation. Each installment shall not be less than Twenty-five Thousand Dollars by each party, and be payable upon thirty days' notice.

9. Parties of the First Part agree to execute and deliver any and as many additional conveyances as may be necessary or proper to carry out and render effective each and all the provisions hereof.

10. Unless and until there shall be separate valuation for taxation of mineral rights, Parties of the First Part shall render and pay all taxes, ignoring mineral rights. After separate valuation (if such arises) each party will pay its taxes upon mineral rights, or if paid by another, will reimburse the party paying in proportion to the ownership thereof. All litigations involving title to the lands covered hereby (and to which Grantees are not parties) shall be conducted solely at the expense of Parties of the First Part, or one of them. Grantees or either of them may become parties to such litigations if entitled so to do and appear by their own counsel. In all events, Grantees shall at all times be kept advised of the nature and progress of all litigations in which such mineral rights are or may be involved, and be entitled to demand periodical reports covering such information.

11. All maps, abstracts, title opinion, muniments of title, surveys, etc., etc., in possession of Parties of the First Part, or either of them, and all such as shall hereafter come into such possession in regard to lands covered hereby shall, upon request, be available to the Grantees, or either of them, with privilege of making copies at will.

12. It is distinctly understood and is part of this contract, that neither of the Trustees of Trust Estate, nor any of them, are to be held bound in any manner, in his individual capacity, or otherwise, than as Trustees as aforesaid, by reason hereof, or of any of the covenants or stipulations herein, but only the Trust Estate shall be bound.

13. This instrument shall be executed by all parties in four counterpart originals of equal dignity. All the terms

hereof shall be binding upon and inure to the benefit of the parties respectively, and the assigns and legal representatives of such.

In Witness Whereof, the said Houston Oil Company of Texas has hereunto set its hand and corporate seal, and the Trustees of the Southwestern Settlement and Development Company (Not Incorporated), as aforesaid, have caused same to be executed by and through their President and Attorney-in-Fact, and Republic Production Company has hereunto set its hand and its corporate seal, and the Federal Petroleum Company has hereunto set its hand and corporate seal, this, the 15th day of November, A. D. 1916; this instrument being executed by all parties in four counterpart originals of equal dignity, this being one of such originals.

(Signatures omitted)
(Certificates of Acknowledgment omitted)